No. 87-1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WALTER UNTERMEYER,
Petitioner,

v.

VALHI, INC., CSX CORPORATION AND
SEA-LAND CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT VALHI, INC. IN OPPOSITION

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QUESTION PRESENTED

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), authorizes only the "issuer" or an "owner of any security of the issuer" to bring suit. The Second Circuit held that petitioner, who owns securities not of the issuer but of the parent corporation of the issuer, lacks standing to sue under section 16(b).

The Second Circuit's holding follows the decisions of other Courts of Appeals. *Lewis v. McAdam*, 762 F.2d 800, 803-04 (9th Cir. 1985) ("shareholder of the parent corporation . . . lacks standing to bring a section 16(b) action"); *Portnoy v. Kawecki Berylco Industries, Inc.*, 607 F.2d 765, 767-69 (7th Cir. 1979) (shareholder of the issuer's corporate grandparent cannot maintain a section 16(b) suit). The Second Circuit factually distinguished *Blau v. Oppenheim*, 250 F. Supp. 881 (S.D.N.Y. 1966), an unreviewed opinion that petitioner claims to be controlling.

Accordingly, the question presented is: whether the Second Circuit erred in following the Ninth and Seventh Circuits' decisions in *Lewis* and *Portnoy*, respectively, and in distinguishing on its facts a 1966 opinion of a district judge in its Circuit.

STATEMENT PURSUANT TO RULE 28.1

This brief in opposition to the petition for a writ of certiorari is filed on behalf of Valhi, Inc. Valhi's corporate parents are Contran Corporation, National City Lines, Inc., and Valhi Group, Inc. Excluding wholly-owned subsidiaries, Valhi's subsidiary is NL Industries, Inc. Valhi is directly affiliated with Dixie Products, Inc. Valhi is also indirectly affiliated with the aforementioned companies' subsidiaries or affiliates, none of which is publicly traded with the exception of Keystone Consolidated Industries, Inc., Sybra, Inc., and T.I.M.E.-DC, Inc.

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BRIEF FOR RESPONDENT VALHI, INC. IN OPPOSITION

Untermeyer's petition for a writ of certiorari raises no issue meriting this Court's attention. The unanimous Second Circuit panel properly affirmed the District Court's holding that petitioner, a shareholder of the parent corporation of the issuer, lacks standing to bring suit under section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). The decision below is entirely consistent with case law from other Circuits, *Lewis v. McAdam*, 762 F.2d 800, 803-04 (9th Cir. 1985); *Portnoy v. Kawecki Berylco Industries, Inc.*, 607 F.2d 765, 767-69 (7th Cir. 1979), as well as this Court's own securities law precedents on standing and section

16(b), and the legislative history and purpose of the statutory provision. The Second Circuit properly distinguished *Blau v. Oppenheim*, 250 F. Supp. 881 (S.D.N.Y. 1966), an uncontrolling opinion that is inapposite here. The ruling below neither conflicts with the decisions of this Court nor presents any significant federal question which calls for this Court to grant certiorari. The petition, therefore, should be denied.

COUNTER-STATEMENT OF THE CASE

The "facts" Untermeyer presents in his petition are predicated on allegations of his pleadings, not on any record evidence. Such a predicate is both improper and inadequate, for Untermeyer was confronted below with a summary judgment motion. This Court does not permit "a party opposing summary judgment to resist a properly made motion by reference only to its pleadings." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The "plaintiff must present affirmative evidence," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), but Untermeyer never did.[1]

In contrast, respondent Valhi presented concrete evidence in support of its summary judgment motion. (App. 31-119.) That evidence established the following undisputed material facts:

1. Untermeyer purports to bring this suit under section 16(b) to recover certain profits allegedly received by predecessors of Valhi from trading in shares of common stock of Sea-Land Corporation. (App. 118, ¶ 1.)

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[1] Thus, contrary to Untermeyer's unsubstantiated allegations, the Court cannot assume that Valhi bought and sold any Sea-Land shares within six months, that Valhi had access to any inside information, or that Valhi was improperly indemnified against any section 16(b) liability. No evidence was offered to the District Court in support of any of these claims.

2. Untermeyer allegedly is a stockholder of CSX Corporation. He has never owned any securities of Sea-Land. (App. 118, ¶ 2.)

3. After the transaction at issue, a CSX subsidiary was merged into Sea-Land. As a result, CSX became the owner of all of the shares of Sea-Land common stock. (App. 118-19, ¶ 3; 31-117.)

Based on those evidentiary facts, Valhi moved for summary judgment against Untermeyer. After briefing and argument, the motion was granted by Judge Cedarbaum in a published opinion. *Untermeyer v. Valhi, Inc.*, 665 F. Supp. 297 (S.D.N.Y. 1987). On appeal, the Second Circuit unanimously affirmed (P.B. 15a-16a) and, on Untermeyer's motion for rehearing, issued a published decision unanimously reaffirming the entry of summary judgment. *Untermeyer v. Valhi, Inc.*, 841 F.2d 25 (2d Cir. 1988). The Second Circuit rejected Untermeyer's suggestion for rehearing *en banc*. (P.B. 23a-24a.)

REASONS FOR DENYING THE PETITION

Review by this Court is "not a matter of right" but "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. Petitioner does not identify any issue meriting this Court's attention. Instead, he repackages the same argument he unsuccessfully presented below. Both the District Court and the Second Circuit carefully considered petitioner's argument and rejected it as contrary to well-established federal precedent and without foundation in fact. This Court should not disturb those rulings.

I. THE UNANIMOUS SECOND CIRCUIT PANEL CORRECTLY RULED THAT PETITIONER LACKS STANDING TO BRING ANY SUIT UNDER SECTION 16(b) CONCERNING SEA-LAND SECURITIES.

Section 16(b) provides that a suit thereunder to recover for trading in an issuer's securities may be instituted only "by *the issuer*, or by *the owner of any security*

of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter." 15 U.S.C. § 78p(b).[2] The term "issuer" is specifically defined to mean the "person who issues or proposes to issue any security." 15 U.S.C. § 78c(a)(8). It is undisputed that the issuer here is Sea-Land.

Because Untermeyer has neither issued nor owned any Sea-Land securities, the District Court and the Second Circuit held that he lacked standing to sue under section 16(b). In so holding, the Courts below rejected petitioner's request that the statutory definition of "issuer" be judicially changed to encompass not only Sea-Land but its parent corporation CSX as well. As a shareholder of the parent of the issuer—not of the issuer—Untermeyer cannot bring a section 16(b) suit.

Although he asserts that the Second Circuit's ruling "undermines half a century of rich jurisprudence in this Court and the Courts of Appeals" (P.B. 4), Untermeyer does not cite a single Supreme Court case in his petition. Nor does he identify a single case from any Court of Appeals applying the statutory definition of "issuer" in the way he proposes. All of this is unsurprising, since petitioner's approach is contrary to directly applicable federal decisions applying the statutory definition, is inconsistent with this Court's securities law precedents, and is unsupported by section 16(b)'s legislative history and purpose.

A. The Decision Below Follows Well-Settled, Directly Applicable Federal Precedents.

The Second Circuit's holding follows all the directly applicable decisions from other Circuits. The Ninth and Seventh Circuits, as well as a District Court in the Third

[2] All emphasis added unless otherwise indicated.

Circuit, have all rejected attempts to broaden the meaning of the term "issuer" beyond its statutory definition. The cases consistently hold that one must be a shareholder of the "issuer"—not merely of its corporate parent, grandparent or subsidiary—to have standing to sue under section 16(b).

In *Lewis v. McAdam*, 762 F.2d 800 (9th Cir. 1985), the key issue was precisely the same one addressed below: whether "a shareholder of the parent may be deemed an 'owner of a security in the issuer' for purposes of bringing a section 16(b) action." *Id.* at 803. After analyzing the text and legislative history of section 16(b), the Ninth Circuit concluded that Congress did not intend to permit a shareholder of the issuer's parent to bring suit:

> *We find nothing in the legislative history of section 16(b) indicating that the plain meaning of the statutory language is inadequate to effect the congressional purpose of providing an enforcement mechanism against insider trading.* That a merger may result in a corporation succeeding to an action formerly held by an individual is a consequence dictated by the statute. *We will not confer standing on a plaintiff who falls outside the class of persons permitted by the language of the statute to bring suit* merely because the only parties falling within the class choose not to exercise their right to sue.
>
> Congress is well aware of the corporate practice of parent companies utilizing wholly owned subsidiaries in merger transactions. Had Congress wanted to discourage this practice by conferring standing on shareholders of a parent corporation whose wholly owned subsidiary absorbed the original issuing corporation, it knew how to do so. Accordingly, *we conclude that Congress included in the statutory language of section 16(b) all the remedies it deemed appropriate.*

Id. at 804 (citations omitted). Thus, the Ninth Circuit held:

> [T]he parent corporation is not an "issuer" within the meaning of section 16(b). Similarly, *a shareholder of the parent corporation cannot be considered an "owner of any security of the issuer" and accordingly lacks standing to bring a section 16(b) action.* In the case before us, Sears is not a section 16(b) "issuer," and Lewis, who owned stock in neither SDC nor Coldwell Banker, lacks standing under the statute.

Id.

In *Portnoy v. Kawecki Berylco Industries, Inc.*, 607 F.2d 765 (7th Cir. 1979), the critical issue was whether the plaintiff's status as a shareholder of Cabot (the parent of the parent of the issuer) gave him standing to sue under section 16(b). Based on a thorough analysis of the pertinent statutory provisions and case law, the Seventh Circuit refused to draft "judicial legislation" to grant the plaintiff standing:

> The statutory language is thus specific that the issuer is the person who issues the security which is involved in the short-swing trading, in this case, KBI.
>
> *The plaintiff asks us to broaden the definition to encompass Cabot which would make the issuer include the parent of the parent of the issuer. . . . [W]e cannot rewrite the statute to accommodate this situation.* Congress has spoken clearly. When it wanted a broader definition of issuer, it drafted one. In § 2(a)(11) of the Securities Act of 1933, for example, "issuer" is defined as including "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." 15 U.S.C. § 77b(11). *In § 16(b),* on the other hand, *Congress apparently intended only those with a less tenuous financial interest to have standing and confined standing other than to the "issuer" itself to "the owner of any security of the issuer."*

> . . . *We similarly reject the plaintiff's invitation to draft "judicial legislation to grant him standing."*

Id. at 767-68 (footnotes omitted). Because Portnoy was not a shareholder of the issuer, the Seventh Circuit held that he lacked standing to sue.

Lee National Corp. v. Segur, 281 F. Supp. 851 (E.D. Pa. 1968), while technically not a standing case, turned on whether the statutory definition of "issuer" included a corporation's wholly-owned subsidiary. Judge Troutman held that an officer of a wholly-owned subsidiary is not an officer of the "issuer" within the meaning of section 16(b):

> [Plaintiff's counsel] seeks a judicial broadening of the specific and express language of the statute. . . . [T]he fact is that if it be the congressional intent to include officers of subsidiary corporations as well as officers of the "issuer" corporation, this can be quickly accomplished by a single amendment to the Act. It need not be accomplished by what may be considered "judicial legislation."

Id. at 852. Accordingly, the complaint there was dismissed as it sought "a broad interpretation of the statute not warranted and justified by the language of the statute. *Id.*[3]

The Second Circuit's decision below is also consistent with *American Standard, Inc. v. Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975). There the Second Circuit ruled that "issuer" cannot be construed to encompass multiple entities, rather than just the single issuing corporation:

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[3] The result in *Lee National* was endorsed by the Seventh Circuit in *Portnoy*, 607 F.2d at 768, as well as by the SEC. *See* Interpretive Release on Rules Applicable to Insider Reporting and Trading, Exchange Act Release No. 18,114, 23 SEC Docket 856, 861 (Sept. 23, 1981) (president of a wholly-owned subsidiary "would not ordinarily be considered an officer under Section 16(a) since he is not an officer of the issuer").

> The statute speaks of "such issuer" in the singular. There is no room for a grammatical construction that would convert the singular into a plural. Nor does the internal construction of the section lend itself to such a free interpretation.
>
> . . . .
>
> . . . The style and substance lead to the conclusion that Congress was concerned with a single issuer.

Id. at 1058-59 (holding that the purchase of shares of one issuer cannot be matched against the sale of shares of a successor issuer).

In short, the decision below raises no conflict with the well-established, uncontroverted case law from other Circuits. The results reached by the Ninth Circuit in *Lewis*, the Seventh Circuit in *Portnoy*, the Third Circuit District Court in *Lee National*, and the Second Circuit in *Untermeyer* below are all in accord and are all correct.

B. The Decision Below Is Fully Consistent With This Court's Guiding Securities Law Precedents.

Untermeyer's petition makes no mention of any of this Court's securities law precedents. This is no wonder given that these precedents support the decision below and contradict the approach he advocates.

This Court has strictly construed the standing requirements of the Securities Exchange Act. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24-46 (1977) (tender offeror lacks standing to sue for damages under section 14(e), 15 U.S.C. § 78n(e), or SEC Rule 10b-5, 17 C.F.R. § 240.10b-5); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-55 (1975) (only actual purchasers and sellers have standing to sue for damages under SEC Rule 10b-5). This restrictive approach avoids the "danger of vexatious litigation which could result from a widely expanded class of plaintiffs." 421 U.S. at 740, *quoted in*

Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977).[4]

Specifically, this Court has refused to impose liability under section 16(b) where it would involve a departure from the statutory language. In *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418 (1972), this Court held that a statutory insider, a "beneficial owner of more than 10 per centum," may properly "sell enough shares to bring his holdings below 10%, and later—but still within six months—sell additional shares free from liability under the statute." *Id.* at 423. The language used by Congress in section 16(b) to limit liability must be "[*r*]*ead literally*" and applied with a "*mechanical quality.*" *Id.* at 423, 425. Courts "are not free to adopt a construction that not only strains, but flatly contradicts, the words of the statute." *Id.* at 427.

Similarly, in *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 239-60 (1976), this Court held that section 16(b) does not apply to a "beneficial owner of more than 10 per centum" of the issuer's securities unless his holdings are above 10% at the time of both his purchase *and* sale of securities. Section 16(b) has "*narrowly drawn limits.*" *Id.* at 251. Liability must not be imposed unless Congress' statutory language authorizes it "*expressly or by unmistakable inference.*" *Id.* at 252.

And in *Blau v. Lehman*, 368 U.S. 403, 409-14 (1962), this Court held that a Lehman Brothers partner sitting on a company's board of directors was not a "director" deputized by Lehman so as to make the partnership liable for profits it "realized" from short-swing trading in the

[4] This Court is well aware that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps*, 421 U.S. at 740.

company's stock. In so holding, the Court rejected the SEC's invitation to rewrite section 16(b)'s terms to the extent liability was "*not justified by the literal language of § 16(b).*" *Id.* at 411. "Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change is to be made." *Id.* at 413. Liability cannot be extended "by adding to the 'prophylactic' effect Congress itself clearly prescribed in § 16(b)." *Id.* at 414.

The decision below is consistent with this Court's guiding securities law precedents. The Second Circuit correctly declined to enlarge the scope of section 16(b) beyond its statutory limitations. Reading the statutory provision literally and non-expansively, a shareholder of the parent of the issuer lacks standing to sue.

C. The Decision Below Is Supported By The Legislative History And Purpose Of Section 16(b).

The legislative history of section 16(b) is devoid of any suggestion that Congress intended a shareholder of the parent of the issuer to have standing to sue. As the Ninth Circuit concluded, there is "nothing in the legislative history of section 16(b) indicating that the plain meaning of the statutory language is inadequate to effect the congressional purpose of providing an enforcement mechanism against insider trading." *Lewis*, 762 F.2d at 804. Similarly, the Second Circuit has determined: "In the legislative history we have observed no omission by inadvertence." *American Standard*, 510 F.2d at 1061.

Rather, the legislative history indicates that Congress intended recovery of short-swing profits be limited to the issuer, not extended to its corporate affiliates or their stockholders. *See* H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 35-36 (1934) (provision requires that profits be yielded "to the issuer"; "authorizes the issuer to recover such profit by suit"); S. Rep. No. 792, 73d Cong., 2d

Sess. 20-21 (1934) (provision makes profits "available to the issuer").

The legislative history also demonstrates that Congress intended section 16(b) to be merely "prophylactic" and did not intend to address each and every situation involving alleged short-swing trading. The House Report expressly recognized that section 16's "requirements are not air-tight" and that one "may still, within the law, use inside information for his own advantage." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934). Thus, as the District Court below stressed, the "statutory language may not be strained or distorted to add to the ' "prophylactic" effect Congress itself clearly prescribed in § 16(b).' " 665 F. Supp. at 300 (quoting *Blau v. Lehman*, 368 U.S. at 414).[5]

In light of this legislative history, the reach of section 16(b) must not be expanded beyond the specific statutory language. *Lewis*, 762 F.2d at 804 ("Congress included in the statutory language of section 16(b) all the remedies it deemed appropriate"); *Lee National*, 281 F. Supp. at 852 ("Courts may not give content to an Act beyond its language").

Nor would a grant of standing to petitioner serve the legislative purpose of section 16(b). That section

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[5] The gaps in section 16(b)'s coverage are many and obvious. For example, Congress limited the provision's coverage to transactions occurring within a six-month period. A statutory insider who waits six months and one day after the purchase to avoid a short-term gain is unaffected by the provision. *Adler v. Klawans*, 267 F.2d 840, 845 (2d Cir. 1959). "One can speculate on whether the moral or ethical values are altered by the passage of 24 hours but the statute makes an honest if not honorable man out of the insider in that period." *Id.* In addition, section 16(b) applies only to transactions of the issuer's directors or officers or of shareholders who own more than 10% of its equity securities. It does not affect the trading practices of 9.9% shareholders. *Foremost-McKesson*, 423 U.S. at 239-60; *Reliance Electric*, 404 U.S. at 422-27. Nor does it ordinarily affect the transactions of directors and officers of the issuer's wholly-owned subsidiary. *Lee National*, 281 F. Supp. at 852.

> was designed to prevent a corporate director or officer or "the beneficial owner of more than 10 per centum" of a corporation from profiteering through short-swing securities transactions on the basis of inside information. It provides that a corporation may capture for itself the profits realized on a purchase and sale, or sale and purchase, of its securities within six months by a director, officer, or beneficial owner.

Foremost-McKesson, 423 U.S. at 234 (footnotes omitted).

The factual circumstances of this case are markedly removed from this congressional purpose. The transaction at issue did not involve a purchase and *sale* of a statutory insider's stock. To the contrary, petitioner seeks to challenge the grant of an *option* to sell Sea-Land securities to CSX. (App. 17, ¶ 13.) "But the mere execution of an option to sell is not generally regarded as a 'sale' " within the ambit of section 16(b). *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 601 (1973).

Similarly, this case does not fit within the "congressional purpose of curbing short-swing speculation by *corporate insiders*." *Reliance Electric*, 404 U.S. at 424. Respondent Valhi is the classic *outsider*: an unsuccessful offeror whose bid to acquire Sea-Land was hostilely rebuffed, a position "*sui generis* in terms of § 16(b) liability." *American Standard*, 510 F.2d at 1053. While "Congress thought that all short-swing trading by directors and officers was vulnerable to abuse," it viewed trading by mere stockholders as abusive only where it "afforded the potential for access to corporate information." *Foremost-McKesson*, 423 U.S. at 253. There was no suggestion below that "Valhi either had access to or made unfair use of inside information." 665 F. Supp. at 298. And such access cannot be presumed: "the status of a defeated tender offeror affords no presumption of abuse of confidential information by virtue of relationship to the issuer." *American Standard*, 510 F.2d at 1053.

Finally, the aim of the petitioner's suit is not to restore alleged short-swing profits to the issuer Sea-Land, but to provide a gigantic bonanza to his own corporation CSX. This is a misuse of section 16(b). There is nothing but "sheer windfall" in handing a recovery to CSX, a corporation that was not in any relationship with Valhi other than as a competing bidder for Sea-Land. *See American Standard*, 510 F.2d at 1061. No such recovery may be properly allowed.

II. IN FACTUALLY DISTINGUISHING AN UNREVIEWED 1966 DECISION OF ITS DISTRICT COURT, THE SECOND CIRCUIT RAISED NO IMPORTANT QUESTION OF FEDERAL LAW REQUIRING THE ATTENTION OF THIS COURT.

Petitioner cannot demonstrate that the Second Circuit raised an important question of federal law by distinguishing *Blau v. Oppenheim*, 250 F. Supp. 881 (S.D.N.Y. 1966), on its facts. Both Courts below properly distinguished that unreviewed 1966 district court opinion in accordance with well-settled lines of federal law.

In *Blau v. Oppenheim*, a shareholder of American Can Company brought a section 16(b) suit concerning trading in the securities of Hanson-Van Winkle Mining Company. After the alleged short-swing trading, Hanson-Van Winkle sold and transferred all its assets and choses in action to M & T Chemicals, Inc., a wholly-owned subsidiary of American, and in return the Hanson-Van Winkle shareholders received shares of American stock. Hanson-Van Winkle was merged into M & T and ceased to exist. Blau was allowed to maintain the action as a shareholder of American.

As the District Court below held, the facts in *Blau v. Oppenheim* are readily distinguishable:

> A key fact in *Oppenheim* was the disappearance of the issuer and the consequent concern that no person or entity would have standing to sue under section

> 16(b). 250 F. Supp. at 886. . . . Here, the issuer, Sea-Land, survives as a corporate entity with CSX as its shareholder. Sea-Land itself could bring a section 16(b) action against Valhi. If Sea-Land chose not to, CSX, as the shareholder of Sea-Land, could bring a section 16(b) action against Valhi. If the agreements between CSX and Valhi improperly deterred CSX from bringing such an action, CSX shareholders are not without a remedy. They could bring a derivative suit against the directors and officers of CSX for breach of fiduciary duty, a point not considered in *Oppenheim*.
>
> A second significant difference is that in *Oppenheim* the parent corporation was in a real sense the successor of the defunct issuer. In the absence of a surviving issuer, the court construed the statutory term "issuer" to include the substantial successor of the issuer. Thus, both the parent, as "issuer," and the shareholder plaintiff, as an "owner of any security of the issuer," had standing to bring the section 16(b) action. A justification for treating the parent as the successor issuer was that in the merger of the issuer into the parent's wholly owned subsidiary, the shareholders of the issuer received shares of the parent in exchange for their shares of the issuer. 250 F. Supp. at 883, 887. Here, however, the transaction took place without a similar exchange of securities; the parent's stock was not exchanged for stock of the issuer. Stock of the issuer was exchanged for cash. Thus, there would be no reason to consider CSX as the successor issuer of Sea-Land.

665 F. Supp. at 300-01.

Affirming the District Court, the Second Circuit held that these were "important distinctions" that distinguished *Blau v. Oppenheim* from this case. 841 F.2d at 25. Notably, the Seventh Circuit in *Portnoy* also ruled the case distinguishable on essentially the same grounds:

> *Blau* is factually distinguishable in that the issuer no longer existed, whereas in the present case KBI

> still exists as a viable corporate entity. This distinction justifies the different result in *Blau*, because if the statutory language were applied to allow only shareholders of the issuer to enforce the violation, and the issuer were dissolved, the statutory language would require the absurd result that no party would exist who had standing to enforce the violation. In the present case, since KBI still exists, its shareholder, CSMC, had the right to bring the action regardless of whether it chose to exercise that right.

607 F.2d at 768-69 (footnotes omitted).[6]

In an effort to avoid these important factual distinctions, petitioner claims that *Blau v. Oppenheim* has been "followed by the lower courts, including the Second Circuit." (P.B. 5.) But what Untermeyer fails to point out is that the case has been followed only for the unremarkable proposition—not relevant here—that the suc-

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[6] *Blau v. Oppenheim* is distinguishable on other grounds as well. That case involved a "sale" of the defendant insider's stock, a transaction expressly covered by section 16(b). In contrast, Untermeyer wants to attack the grant of an "option" to sell Sea-Land securities to CSX—a transaction generally regarded as outside the reach of section 16(b). *See Kern County*, 411 U.S. at 601. Also, defendant Oppenheim, a director and officer of Hanson-Van Winkle, was a true insider. Valhi is the classic outsider, an unsuccessful offeror who neither "had access to [n]or made unfair use of inside information." 665 F. Supp. at 298. As such, no liability may sensibly be imposed on Valhi here.

Blau v. Oppenheim was also premised on an incorrect interpretation of section 16(b). The court there acknowledged that "upon a strict or literal reading of section 16(b) plaintiff never was 'the owner of any security of the issuer,'" but declined to read the statute in that manner. 250 F. Supp. at 884. This was a mistake. Under this Court's precedents, the statutory language used to limit liability must be "[r]ead literally" and non-expansively. *Reliance Electric*, 404 U.S. at 423; *see Foremost-McKesson*, 423 U.S. at 251-52 (section 16(b) has "narrowly drawn limits"; no liability can be imposed unless statutorily authorized "expressly or by unmistakable inference"); *Blau v. Lehman*, 368 U.S. at 411 (rejecting liability "not justified by the literal language of § 16(b)").

cessor corporation of a defunct issuer inherits the latter's choses in action. *American Standard*, 510 F.2d at 1057 n.22; *Newmark v. RKO General, Inc.*, 425 F.2d 348, 352 n.4 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970). As the District Court below concluded, "the Second Circuit has never held that such standing may be extended to a shareholder of the parent corporation of a surviving issuer. The language of section 16(b) does not permit such a result." 665 F. Supp. at 301.

From the false premise that *Blau v. Oppenheim* has been "followed," petitioner asserts that the decision below "further entangles a preexisting conflict among the circuits." (P.B. 7.) In fact, however, there is no conflict at all. The cases cited by petitioner uniformly support two consistent legal principles: (1) a shareholder of the corporate parent (or grandparent) of the issuer lacks standing to sue under section 16(b), *Untermeyer*, 841 F.2d at 25; *Lewis*, 762 F.2d at 803-04; *Portnoy*, 607 F.2d at 767-69; and (2) where a successor corporation inherits a defunct issuer's choses in action, a shareholder of the successor has standing to sue, *Lewis*, 762 F.2d at 802-03; *Newmark*, 425 F.2d at 352 n.4.

In sum, the Courts below correctly distinguished *Blau v. Oppenheim*. And in all events, the Second Circuit's decision to distinguish rather than to overrule that case raises no issue warranting this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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